

ORIGINAL  
FILED  
2010 FEB 17 P 1:12  
RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

William M. Audet (CA State Bar #117456)  
waudet@audetlaw.com  
Adel Nadji (CA State Bar #232599)  
anadji@audetlaw.com  
Jonas P. Mann (CA State Bar #263314)  
jmann@audetlaw.com  
AUDET & PARTNERS, LLP  
221 Main Street, Suite 1460  
San Francisco CA 94105  
Telephone: 415.568-2555  
Facsimile: 415.568.2556

Gary E. Mason  
Donna F. Solen  
MASON LLP  
1625 Massachusetts Ave., NW  
Ste. 605  
Washington, DC 20036  
Phone: (202) 429-2290  
Fax: (202) 429-2294  
Email: gmason@masolawdc.com

*Attorneys for Plaintiffs  
and the Proposed Class*

THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

CV 10

6727

EVA HIBNICK, individually and  
on behalf of all others similarly situated,

Plaintiff,

vs.

GOOGLE INC.,

Defendant

Case No.:

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

Plaintiff, EVA HIBNICK ("Plaintiff"), by and through her attorneys, allege on personal knowledge as to all facts related to herself and on information and belief as to all other matters, which are based upon, among other things, the investigation made by Plaintiff through her counsel and personal knowledge, as follows:

**PRELIMINARY STATEMENT**

1. This is a class action lawsuit, brought by, and on behalf of, a nationwide class of individuals whose privacy rights were violated by the actions of Google Inc. ("Google") through its Google Buzz program.

2. Google automatically added the Google Buzz service to the accounts of all users of Google's "Gmail" service.

3. Google Buzz made private data belonging to Gmail users publicly available without the users' knowledge or authorization. This information included some or all of the following: personal contact information, place of residence, occupation, and a list of the users' frequent email contacts.

4. When launching its Buzz service, Google failed to provide users with clear information detailing the nature of the new service, including the automatic application of the Buzz program and its provisions for default disclosure of personal information.

5. Google failed to provide users with a meaningful opportunity to opt out of the Buzz service before sharing their data publicly.

6. Google has publicly admitted that its Buzz program presents privacy concerns, and Google has made several waves of modifications to the program. However, Google's modifications do not go far enough to address the problem. Furthermore, Google's actions have already caused damage because the Buzz program disclosed private user information the moment Google launched the service. The bell of breached privacy cannot be un-rung.

7. Google's public disclosure of private user data violates users' rights under the Federal Electronic Communications Privacy Act, the Federal Computer Fraud and Abuse Act, the Federal Stored Communications Act, and California common and statutory law.

**JURISDICTION AND VENUE**

8. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 for deprivation of rights guaranteed under the Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.*, the Stored Communications Act, 18 U.S.C. § 2701 *et seq.*, and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 *et seq.* This Court also has jurisdiction pursuant to 28 U.S.C. §

1 1367(a) over Plaintiff's state statutory and common law claims. Jurisdiction is also founded  
 2 upon 28 U.S.C. §1332(d) in that this is a putative class action with more than 100 class members,  
 3 more than \$5 million in controversy, and minimal diversity of citizenship.

4 9. Venue is appropriate pursuant to 28 U.S.C. § 1391(b) and (c). A substantial  
 5 portion of the events and conduct giving rise to the violations alleged in this complaint occurred  
 6 in this District. Defendant Google resides here as it maintains its principle office and  
 7 headquarters in this District.

#### 8 **PARTIES**

9 10. Plaintiff Eva Hibnick is a user of Google's "Gmail" email service. She is a  
 10 citizen of Sarasota County, State of Florida. Google automatically activated the Buzz program  
 11 on Plaintiff's account, as a result of which Buzz broadcast Plaintiff's personal information to  
 12 other Gmail users and/or made this information publicly viewable on the Internet.

13 11. Defendant Google Inc. is a Delaware corporation headquartered at 1600  
 14 Amphitheatre Parkway, Mountain View, CA 94043. Google provides a variety of internet-  
 15 related services, including email service through its "Gmail" program. Google does business  
 16 throughout the United States, and in particular, does business in the State of California and in  
 17 this district.

#### 18 **STATEMENT OF COMMON FACTS**

19 12. Google launched the Google Buzz program on or about Tuesday, February 9,  
 20 2010. Google Buzz enables users of Google's "Gmail" service to share written posts, photos,  
 21 hyperlinks, and other information with other Gmail users. Buzz is Google's attempt to compete  
 22 with social networking programs such as Facebook and Twitter.

23 13. To jump-start that competition, Google, without any authorization by Gmail  
 24 users, automatically added Google Buzz to the accounts of all Gmail users.

25 14. When Buzz was first rolled out on February 9, Gmail users who accessed their  
 26 mail accounts were initially given two options: (1) set up Google Buzz; or (2) continue to Gmail  
 27 inbox. Regardless of which option the user chose, Google automatically activated the Buzz  
 28 program on that user's Gmail account. Option (2) therefore deceptively implied that by selecting

1 it, and not the "set up Google Buzz" option, the user was not activating Buzz -- but in fact  
2 Google activated Buzz even if the user did not elect to "set up" the program.

3 15. Google Buzz automatically created a list of "followers" for each Gmail user.

4 16. Google Buzz also automatically created a list of persons whom the user was  
5 automatically "following."

6 17. Google Buzz "posted" to Buzz any information that was previously posted to  
7 certain other Google websites, including but not limited to Picasa, Google Reader, and Twitter.

8 18. Google created the "follower" and "following" lists by using an algorithm that  
9 selected those email contacts with whom a Gmail user communicated most frequently. This  
10 meant that Google shared information about a Gmail user with the users' frequent email contacts.  
11 By contrast, a social networking program such as Facebook shares information with "Friends"  
12 only after both parties have agreed to become Friends. An individual's email contacts may be a  
13 different group of people (for example, professional contacts) than the group with whom a user  
14 would want to be in a social network. By implementing the Buzz program, Google forced upon  
15 its Gmail users Google's own definition of a proper social network, all in an effort to jump-start  
16 Google's entry into a new consumer market.

17 19. When Google automatically activated Google Buzz in a user's Gmail account,  
18 Google's unilateral actions had significant privacy consequences, including but not limited to:

- 19 \* the "following" and "follower" lists of each user were made  
20 publicly available on the web;
- 21 \* the "following" and "follower" lists of each user were made  
22 available to persons following that user;
- 23 \* followers could view any information posted on Buzz by  
24 someone they were following;
- 25 \* for Gmail users who have created a "Google profile," the  
26 contents of the profile became visible to all persons who are  
27 "following" the user. A user's Google profile may contain  
28 information such as the user's occupation, place of residence,  
and contact information; and
- \* for Gmail users who have created a "Google profile," the  
"following" and "follower" lists of the user became visible to  
all persons who are "following" the user, and were made  
publicly available to be searched and viewed by any person on  
the Internet.

1           20.     Google's own privacy policy confirms these points:

2                     When you first enter Google Buzz, to make the startup experience  
3                     easier, we may automatically select people for you to follow based  
4                     on the people you email and chat with most. Similarly, we may  
5                     also suggest to others that they automatically follow you . . . Your  
6                     name, photo, and the list of people you follow and people  
7                     following you will be displayed on your Google profile, which is  
8                     publicly searchable on the Web.

9                     Google Buzz Privacy Policy, February 11, 2010, available at  
10                    <http://www.google.com/buzz/help/intl/en/privacy.html>.

11           21.     The procedures by which Gmail users could opt-out of Buzz were either  
12                    unavailable or difficult to understand and execute.

13           22.     Google's automatic sharing of user contact information, profile information, and  
14                    postings had the effect of revealing to the public confidential and sometimes highly sensitive  
15                    information. This means that, for example, the names of a doctor's patients or a lawyer's clients  
16                    were made public in contravention of the privileges that attach to those relationships. Private  
17                    contacts - for instance, the contacts of a gay person who was struggling to come out of the closet  
18                    and had contacted a gay support group - could be revealed to the world. Sensitive personal  
19                    information might be viewed exposed to an employer, or an ex-spouse.

20           23.     This parade of horrors was more than hypothetical. The media reported the  
21                    following exemplary accounts:

22                    \*     A woman whose contact information was made available to her  
23                    abusive ex boyfriend because Google Buzz automatically  
24                    selected him as one of her "followers" in Google Buzz. *See*  
25                    Miguel Helft, *Critics Say Google Invades Privacy With a New*  
26                    *Service*, N.Y. Times, February 13, 2010.

27                    \*     Lawyers and journalists concerned that Google Buzz might  
28                    reveal confidential client and contact lists. Don Cruse, *Lawyers*  
                      *(or journalists) with Gmail Accounts: Careful with the Google*  
                      *Buzz*, February 11, 2010, available at  
                      [http://www.scotxblog.com/legal-tech/lawyer-privacy-on-](http://www.scotxblog.com/legal-tech/lawyer-privacy-on-google-buzz)  
                      [google-buzz](http://www.scotxblog.com/legal-tech/lawyer-privacy-on-google-buzz).

                      \*     A political commentator concerned that authoritarian  
                      governments might "check on Google Buzz accounts for  
                      political activists and see if they have any connections that  
                      were previously unknown to the government." Evgeny  
                      Morozov, *Wrong Kind of Buzz Around Google Buzz*, February

11, 2010, available at  
[http://neteffect.foreignpolicy.com/posts/2010/02/11/  
 wrong\\_kind\\_of\\_buzz\\_around\\_google\\_buzz](http://neteffect.foreignpolicy.com/posts/2010/02/11/wrong_kind_of_buzz_around_google_buzz).

24. A Google spokesperson confirmed to one blogger that Buzz automatically makes public user contact lists:

[B]efore you change any settings in Google Buzz, someone could go into your profile and see the people you email and chat with most.

A Google spokesperson asked us to phrase this claim differently. Like this: "In other words, after you create your profile in Buzz, if you don't edit any of the default settings, someone could visit your profile and see the people you email and chat with most (provided you didn't edit this list during profile creation)."

Nicholas Carson, *WARNING: Google Buzz has Huge Privacy Flaw*, February 10, 2010, available at <http://www.businessinsider.com/warning-google-buzz-has-a-huge-privacy-flaw-2010-2>.

#### **Google Admits to Privacy Problems with Buzz**

25. On Thursday, February 11, 2010, Google reacted to the stream of negative press and blog postings by changing some of the default settings in Google Buzz.

26. Also on February 11, Google issued an official blog posting in which the company admitted that many users had concerns that Buzz violated their privacy. Todd Jackson, *Millions of Buzz Users, and Improvements Based on Your Feedback*, February 11, 2010, available at <http://gmailblog.blogspot.com/>.

27. Despite ongoing modifications, Google has not sufficiently altered the Buzz program to remedy the ongoing privacy violations caused by Buzz. For example, the information sharing features of the Buzz program continue to operate unless the user affirmatively opts out of these features.

28. Google's official Privacy Policy assures customers that, because "[p]eople have different privacy concerns and needs. . . Google strives to offer [its users] meaningful and fine grained choices over the use of their personal information." Google Privacy Policy, <http://www.google.com/privacy.html>.

29. By automatically sharing user information without user authorization or knowledge, Google Buzz does precisely the opposite. Far from granting its customers a fine-

grained set of controls by which users can control the use of their personal data, the Google Buzz program is an indiscriminate bludgeon, forcing all Gmail users to share their personal data in a public forum without their consent or knowledge.

#### **CLASS ALLEGATIONS**

30. Plaintiff brings this complaint on behalf of herself and the class of all Gmail users in the United States to whose accounts Google added the Buzz program.

31. The members of the putative class are so numerous that joinder of individual claims is impracticable. In January of 2009, Gmail had 31.2 million users in the United States. Anthony Ha, Zimbra Tops 40M Paid Users: More Popular Than Gmail?, March 5, 2009, available at <http://venturebeat.com/2009/03/05/zimbra-tops-40m-paid-users-more-popular-than-gmail/>. Google automatically added the Buzz program to most or all of these accounts.

32. There are significant questions of fact and law common to the members of the class. These issues include: whether the Google Buzz program publicly shared user information and if so, what user information Google shared and how; whether Google failed to provide adequate information and opt out procedures for its Gmail users; whether by committing these acts and omissions Google violated federal and state laws; and whether class members are entitled to injunctive, declarative and monetary relief as a result of Google's conduct.

33. Plaintiff's claims are typical of the claims of the putative class. Plaintiff and all members of the putative class have been adversely affected and damaged in that Google publicly shared their private information without the class members' knowledge or consent.

34. The proposed class representative will fairly and adequately represent the putative class because she has the class members' interest in mind, her individual claims are co-extensive with those of the class, and because she is represented by qualified counsel experienced in class action litigation of this nature.

35. A class action in this instance is superior to other available methods for the fair and efficient adjudication of these claims because individual joinder of the claims of all members of the putative class is impracticable. Many members of the class are without the financial resources necessary to pursue this matter. Even if some members of the class could afford to



litigate their claims separately, such a result would be unduly burdensome to the courts in which the individualized cases would proceed. Individual litigation increases the time and expense of resolving a common dispute concerning Google's actions toward an entire group of individuals. Class action procedures allow for far fewer management difficulties in matters of this type and provide the unique benefits of unitary adjudication, economy of scale and comprehensive supervision over the entire controversy by a single court.

36. The putative class may be certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure because Google has acted on grounds generally applicable to the putative class, thereby making final injunctive relief and corresponding declaratory relief appropriate with respect to the claims raised by the class.

37. The putative class may be certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure because questions of law and fact common to class members will predominate over questions affecting individual members, and a class action is superior to other methods for fairly and efficiently adjudicating the controversy and causes of action described in this Complaint.

### **COUNT ONE**

#### **(Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.*)**

38. Plaintiff repeats and reaffirms the assertions of fact contained in paragraphs 1 through 37 above.

39. By engaging in the forgoing acts and omissions, Defendant Google intentionally and without authorization divulged electronic communications in violation of the Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.*

40. Plaintiff seeks declaratory, injunctive and monetary relief as provided for by the Electronic Communications Privacy Act for herself and on behalf of the class.

### **COUNT TWO**

#### **(Stored Communications Act, 18 U.S.C. § 2701 *et seq.*)**

41. Plaintiff repeats and reaffirms the assertions of fact contained in paragraphs 1 through 40 above.



42. By engaging in the forgoing acts and omissions, Defendant Google exceeded its authorization to access and control the private information of Plaintiff and all class members, and/or knowingly divulged the electronic communications of Plaintiff and all class members, in violation of Stored Communications Act, 18 U.S.C. § 2701 *et seq.*

43. Plaintiff seeks declaratory, injunctive and monetary relief as provided for by the Stored Communications Act for herself and on behalf of the class.

### **COUNT THREE**

#### **(Computer Fraud and Abuse Act, 18 U.S.C. § 1030 *et seq.*)**

44. Plaintiff repeats and reaffirms the assertions of fact contained in paragraphs 1 through 43 above.

45. By engaging in the forgoing acts and omissions, Defendant Google intentionally accessed a protected computer without authorization and/or knowingly caused the transmission of information resulting in a loss to one or more persons in violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 *et seq.*

46. Plaintiff seeks declaratory, injunctive and monetary relief as provided for by the Computer Fraud and Abuse Act for herself and on behalf of the class.

### **COUNT FOUR**

#### **(Public Disclosure Tort)**

47. Plaintiff repeats and reaffirms the assertions of fact contained in paragraphs 1 through 46 above.

48. By engaging in the forgoing acts and omissions, Defendant Google committed the common law tort of Public Disclosure of Private Facts as recognized by California common law. The Google Buzz program resulted in the public disclosure of private facts which would be offensive and objectionable to a reasonable person, and which facts are not of legitimate public concern. See *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 478 (Cal. 1998).

**COUNT FIVE****(Violation of California****Business & Professions Code §17200)**

49. Plaintiff repeats and reaffirms the assertions of fact contained in paragraphs 1 through 48 above.

50. Commencing on or about Tuesday, February 9, 2010, and continuing to the present, Google has engaged in, is engaged in, and proposes to engage in unfair competition, as that term is defined in the California Unfair Competition Law, California Business & Professions Code (“UCL”) § 17200.

51. As used in this Complaint and in § 17200, “unfair competition” means (1) an unlawful, unfair or fraudulent business act or practice; (2) unfair, deceptive, untrue or misleading advertising; and/or (3) an act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code. This conduct is actionable pursuant to UCL §§ 17200, 17203.

52. An Unfair Competition Law civil action may be predicated on unfair, deceptive, untrue or misleading advertising and/or any act prohibited by Cal. Bus. & Prof. Code § 17500-17581.

53. Defendant has engaged in unfair, unlawful and fraudulent business practices, as alleged herein, and thereby deprived the Plaintiff and the class of rights and privileges and privacies and statutory rights and protections. If not enjoined by this Court, Plaintiff and the class will continue to suffer irreparable harm as consequence of Defendant’s actions.

54. As a direct and indirect result of Defendant’s violations, Plaintiff and the class have been injured and suffered damages.

55. Among other relief, Plaintiff seeks to enjoin Google from continuing to use the unfair and deceptive practices set forth herein. Plaintiff further seeks damages, plus interest and attorney’s fees pursuant to the California Code of Civil Procedure § 1021.5.

**PRAYER FOR RELIEF**

**WHEREFORE** Plaintiff, on behalf of herself and all others similarly situated, hereby demands judgment against Defendant Google as follows:

- a. For an order certifying the Class proposed herein and appointing Plaintiff and her counsel to represent the Class;
- b. For a declaration that Google's acts and omissions constitute a knowing and unauthorized invasion of its users' privacy rights in violation of the laws of the United States and the State of California;
- c. For preliminary and permanent injunctive relief enjoining and preventing Google from continuing to operate its Buzz program without appropriate safeguards, default provisions and opt-in mechanisms to ensure that the private data of its users is not improperly disclosed or transmitted in the future;
- d. For an award of damages, including without limitation damages for actual harm, profits made by Google in the operation of its Buzz program, and statutory damages where applicable;
- e. For an award of reasonable attorneys' fees and costs incurred by Plaintiff and the members of the putative class in prosecuting this matter; and
- f. For an award of such other relief in law and equity to which Plaintiff and the members of the putative class may be entitled.

DATED: February 17, 2010

AUDET & PARTNERS, LLP

By: 

William M. Audet (SB#117456)  
 Adel A. Nadji (SB# 232599)  
 Jonas P. Mann (SB# 263314)  
 221 Main Street, Suite 1460  
 San Francisco, California 94105  
 Phone: 415.568.2555  
 Fax: 415.568.2556  
 Email: [waudet@audetlaw.com](mailto:waudet@audetlaw.com)

Gary E. Mason  
Donna F. Solen  
MASON LLP  
1625 Massachusetts Ave., NW  
Ste. 605  
Washington, DC 20036  
Phone: (202) 429-2290  
Fax: (202) 429-2294  
Email: [gmason@masolawdc.com](mailto:gmason@masolawdc.com)

*Attorneys for Plaintiffs  
and the Proposed Class*

Of Counsel:  
William Rubenstein  
1545 Massachusetts Avenue  
Cambridge, MA 02138  
ph.: 617.496.7320